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No. 76-1079

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOZEFA LEVC (NEE O'BLAK), ET AL., PETITIONERS

v.

HOLLIS G. CONNORS, TREASURER OF THE STATE OF MONTANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This submission is made in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

Frank O'Blak died intestate in Montana on June 24, 1970 (Pet. App. 2a). His estate, consisting of cash in the amount of $8,693.91, was administered by public administration (*id.* at 2a-3a). The administrator was unable to find any known heirs (*id.* at 2a). Accordingly, the administrator delivered the estate to respondent, the Treasurer of the State of Montana, as escheated funds on January 22, 1971, pursuant to the provisions of the Montana Escheated Property Act, Section 91-501, *et seq.*, R.C.M. 1947 (Pet. App. 2a-4a, 16a).

Petitioners, the nieces and heirs at law of Frank O'Blak, are citizens and residents of Yugoslavia (*id.* at 15a-17a). They were first notified of the death of their uncle on May 24, 1972 (*id.* at 17a). On August 14, 1973, they brought this action in the District Court of the First Judicial District of the State of Montana, claiming the escheated funds under Section 91-509, R.C.M. 1947 (Pet. App. 15a-16a). That statute provides in pertinent part (Pet. App. 4a):

> * * * Such action must be brought within two (2) years from the date on which the money or property is received by the state treasurer, saving, however, to infants and persons of unsound mind, or citizens of the United States beyond the limits of the United States, the right to commence their action at any time within the time limited or two (2) years after their respective disabilities cease.

Respondent contended that petitioner's action was untimely under the two-year statute of limitations provided by Section 91-509. The district court disagreed. Relying upon *Estate of Spehar*, 140 Mont. 76, 367 P. 2d 563, the court observed that "citizens of Yugoslavia 'have the same rights of inheritance in the United States (and Montana) as if they were American citizens residing in Montana'" (Pet. App. 18a). The court concluded that "the claimants here have the same right of 'disability' (Section 91-509) as do American citizens who are not living in the United States" (Pet. App. 18a). Such "disability," the court determined, was removed only "by notice to the non-resident heir or by such heir returning to the United States" (*id.* at 19a). Since petitioners had not entered the United States, the court held that the two-year statute of limitations had not begun to run until they "learned of the date of death of their relative,

Frank O'Blak, and that is May 24, 1972" (*id.* at 21a). Since petitioner's action was commenced within two years of the latter date, their action was deemed timely and they were granted judgment for the escheated funds.

The Supreme Court of Montana, with one Justice dissenting, reversed (Pet. App. 1a-10a). The court recognized that "[i]t is settled by *Kolovrat* v. *Oregon*, 366 U.S. 187, * * * that under the reciprocity provisions of [the 1881 Treaty of Commerce between the United States and Serbia, 22 Stat. 964] and its 'most favored nation' clause, Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Montana" (Pet. App. 4a-5a). The court nevertheless concluded that *Kolovrat* v. *Oregon*, 366 U.S. 187 does not require that the exception in the statute of limitations on behalf of United States citizens outside the United States be extended to Yugoslav nationals residing in Yugoslavia. The court reasoned (*id.* at 7a):

> * * * [T]he statute in question here is a limitation statute and affects the remedy to assert the right, not the right itself. The right of these heirs to inherit is not in question and is established.

The dissenting Justice expressed the view that the 1881 Treaty "dictates that these heirs have the same privilege as native citizens under the statute of limitation" (*id.* at 9a).

DISCUSSION

1. Petitioners, relying upon *Kolovrat* v. *Oregon*, *supra*, contend that, under the 1881 Treaty of Commerce between the United States and Serbia, citizens of Yugoslavia living in Yugoslavia are entitled to the benefit of the exception in the Montana statute of limitations in favor of United States citizens outside the United States. Article II of the Treaty provides in pertinent part (22 Stat. 964; Pet. App. 23a-24a):

> In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.
>
> Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatsoever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

The issue in *Kolovrat* concerned the right of Yugoslav nationals residing in Yugoslavia to inherit their relatives' personal property located in Oregon. The Supreme Court of Oregon had held that the 1881 Treaty did not grant such a right of inheritance, reasoning "that the Treaty confers a right * * * upon a Yugoslavian citizen to acquire property in the United States only if he is 'in the United States.' " 366 U.S. at 192. This Court reversed, ruling that the "broadly stated" rights conferred by the Treaty were not to be circumscribed "in such a niggardly fashion." 366 U.S. at 194. The Court believed that "great weight" must be given to the fact that "diplomatic notes exchanged between the responsible agencies of the United States and of Yugoslavia [indicate] that the 1881 Treaty, now and always, has been construed as providing for inheritance by both countries' nationals without regard to the location of the property to be passed or the domiciles of the nationals." 366 U.S. at 194-195. Since that construction was consistent with the

language and better effectuated the purpose of the Treaty, the Court concluded that "these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would have if they were American citizens living in Oregon." 366 U.S. at 196.

The decision of the Montana Supreme Court does not conflict with this Court's holding in *Kolovrat*. The court below recognized that, under the 1881 Treaty as construed in *Kolovrat*, petitioners have "the same rights to inherit their relatives' personal property as they would if they were American citizens living in Montana" (Pet. App. 4a-5a). The issue in this case does not concern the substantive right of inheritance that was vindicated in *Kolovrat*. Rather, the question is whether the 1881 Treaty requires that every procedural rule, in this case a statute of limitations, be applied literally to Yugoslav citizens as if they were United States nationals.

By its terms, the Treaty does not go that far. Nor does its purpose, which "was in general to put the citizens of the United States and citizens of other treaty countries on a par with regard to trading, commerce and property rights" (*Kolovrat* v. *Oregon, supra,* 366 U.S. at 195), require it to do so. Cf. *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268. The Treaty grants Yugoslav citizens the same substantive rights with respect to acquiring, holding, and disposing of property as are enjoyed by United States citizens. But, in our view, the Treaty does not prescribe complete uniformity in the application of rules that do not invidiously discriminate against foreign nationals in a way that would serve, as a practical matter, significantly to impair their substantive rights.

The operation of the limited exception to the Montana statute of limitations does not invidiously discriminate against petitioners on the basis of their citizenship or deny

them the parity of treatment the Treaty was designed to provide.[1] Although the statutory exception in favor of United States citizens outside the country could have been more narrowly and carefully drafted, it clearly was intended to exempt from the two-year limitation a limited class of persons who, being temporarily absent from their usual domicile, may not learn of a relative's death in the ordinary course.[2] That rationale does not embrace petitioners, who do not suggest that they were outside their domiciliary state when their uncle died.

Extending the exception to petitioners on the ground that they too were "outside the United States" would have the ironical result of granting greater rights of access to American courts to Yugoslav citizens living in Yugoslavia than to United States citizens living in the United States.[3] It would mean, more generally, that a provision designed to

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[1]Indeed, petitioners were not significantly prejudiced by the Montana statute of limitations provisions. Petitioners received notice of their uncle's death well within the two-year period generally allowed by the statute of limitations. At the time they received that notice approximately eight months remained within which to bring a timely action; if they had acted promptly, their claim would have been heard on its merits.

[2]The apparent principal purpose of the exception, which favors United States citizens outside the United States, was to preserve the rights of action of American servicemen stationed abroad during the Second World War (see Pet. App. 6a).

[3]At most, principles of parity would suggest only that Yugoslav citizens outside Yugoslavia would be entitled to the special treatment afforded by the exception. We doubt, however, that even that result is required. Under the Treaty, a local law designed to excuse a class of persons on the basis of nonavailability of notice need not benefit United States citizens and foreign nationals to the same degree. For example, a state concerned with notifying relatives of intestate deaths nevertheless may require only local or national publication of the fact of death, even though only local or national publication generally may favor United States citizens over foreign nationals.

accord special treatment to a very small percentage of United States citizens would become the mechanism for extending such treatment to virtually every citizen of Yugoslavia (and of any other nation having similar treaty rights). Although we recognize that the question is not wholly free of doubt, we do not believe that that result was intended, or is required, by the 1881 Treaty.

2. The issue in this case is not of sufficiently general importance to warrant review by this Court. It does not appear likely that the provision of state law involved will itself give rise to substantial litigation. Nor are we aware of any litigation concerning the effect of the 1881 Treaty on the application of similar laws, if any, in other states. Finally, we are informed by the Department of State that the outcome of this litigation is not anticipated to have any significant effect on the conduct of this nation's foreign affairs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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